In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-87

WILLIAM G. HERRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and another were charged in two indictments returned in the District of Columbia with mail fraud and forgery. On May 11, 1970, the day the forgery indictment was set for trial, petitioner pleaded guilty to one count of the mail fraud indictment. At the subsequent sentencing hearing, petitioner moved to withdraw the guilty plea. The district judge denied the motion and sentenced petitioner to imprisonment for not less than 18 months and not more than 5 years, and the court of appeals affirmed *per curiam* (Pet. App.).

The single contention petitioner makes here is that the trial judge abused her discretion in denying the motion to withdraw the guilty plea. Petitioner and his cousin Charles Barrack were initially charged with

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twelve counts of mail fraud violations under 18 U.S.C. 1341, in connection with the operation of two corporations of which petitioner was president and Barrack was vice-president. A trial on this indictment resulted in a mistrial on October 17, 1969. While the case was awaiting retrial, petitioner and Barrack were charged in another indictment with twenty-four counts of forgery in violation of 22 D.C. Code 1401 and 105.

On the date set for trial of the forgery indictment (May 11, 1970), the prosecutor announced ready and stated that he had been informed by defense counsel of an intended guilty plea (Tr. 2).[1] The trial judge consolidated the two cases, whereupon defense counsel stated that petitioner and Barrack would plead guilty to one count of the mail fraud indictment. After full compliance with Rule 11, Federal Rules of Criminal Procedure, the judge accepted the guilty pleas to one count. The judge then continued the case for a presentence report (Tr. 16).

On the day of sentencing, petitioner's counsel told the court that petitioner "had indicated to me a very strong desire amounting to a direction to me to withdraw his guilty plea that has previously been entered and to be permitted to stand trial on these two indictments" (S. Tr. 3).[2] Counsel explained that the decision to plead guilty to one count of mail fraud

[1] "Tr." refers to the transcript of the hearing on May 11, 1970, which is on file in the United States District Court for the District of Columbia.

[2] "S. Tr." refers to the transcript of the sentencing hearing on July 27, 1970, which is on file in the United States District Court for the District of Columbia.

was made on the understanding that all other charges in both indictments would be dismissed (S. Tr. 3–4), and was heavily influenced by the strong case the government had against Barrack and the fact that Barrack's conduct would reflect unfavorably against petitioner (S. Tr. 4–5). Barrack did not seek to withdraw his guilty plea and the judge sentenced him to imprisonment for not less than nine nor more than forty months (see S. Tr. 5–9).

The judge then sought to ascertain from petitioner personally the reasons for his withdrawal request. During the course of this inquiry, the judge read to petitioner the questions and answers at the time that he pleaded guilty (S. Tr. 10–12; see Pet. 7–8). In substance, petitioner admitted to the judge that the reason for the decision to withdraw was that he feared a jail sentence. The judge denied the motion to withdraw and, after hearing statements from petitioner and his attorney in mitigation, sentenced him and granted the government's motion to dismiss all remaining counts in both indictments (S. Tr. 14–22).

On this record, it is plain, we think, that the district judge did not abuse her discretion in denying petitioner's motion to withdraw the guilty plea. While a district court should "vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence," *Kercheval* v. *United States,* 274 U.S. 220, 224, this case involved none of these factors. Petitioner's reasons for desiring to withdraw the guilty plea—that he was motivated to plead guilty by personal business and family reasons, that he felt he would now rather take his chances on a

trial, and that he feared that if the plea were not withdrawn he would go to jail—were insufficient grounds to require the judge to permit withdrawal. Compare *High* v. *United States,* 288 F. 2d 427, 431–432 (C.A. D.C.), certiorari denied, 366 U.S. 923. Petitioner made no claim that he was innocent (see *Everett* v. *United States,* 336 F. 2d 979, 982 n. 10 (C.A. D.C.)), and did not assert any defense unknown to him at the time of the guilty plea. Nor, contrary to petitioner's assertion, was it unreasonable for the judge to request that petitioner give reasons for the withdrawal in his own words, without interrupting the hearing to consult privately with counsel.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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